

Reviewing Proposed Regulations

California state agencies regularly propose regulations that affect businesses and individuals in the state. Due to the potential economic impact of these regulations, public involvement in the rulemaking (or regulatory) process is important. In particular, the public is provided an opportunity to review and submit comments on all proposed regulations.



The rulemaking process can be confusing, even to those familiar with other state government procedures, such as the legislative process. California rulemaking law places many specific requirements and timetables on both state agencies and the public.

This document was prepared to assist the public in the process. In addition to offering tips and suggestions on reviewing proposed regulations, it provides information on preparing written comments to state agencies.

Tracking Proposed Regulations

The Office of Administrative Law (OAL), an independent agency in the executive branch, oversees the state rulemaking process. OAL was created to ensure that regulations are authorized by statute, consistent with existing laws, and written in a comprehensible manner. (The rulemaking portion of the Administrative Procedure Act begins with Government Code section 11340.)

Notices of proposed actions by state agencies to adopt, amend, or repeal regulations in the California Code of Regulations are published weekly in the *California Regulatory Notice Register*. The on-line *Register* and the California Code of Regulations are on the OAL website at <http://www.oal.ca.gov>. OAL also produces other publications and materials on the process.

Please be aware that proposed regulatory actions can take up to one year from the date of publication to complete. However, the public comment period is normally no more than 45 calendar days from the date of publication.

Obtaining Rulemaking Documents

Rulemaking documents provide the agency information and facts essential for understanding proposed regulations. These documents should be obtained as early as possible, because there are only 45 *calendar* days to review and submit written comments on proposed regulations. The rulemaking documents are required to be on the agency's website. If you do not have computer access, consider having the documents sent via facsimile to minimize lost review time during the comment period.



Key Documents to Review

The Notice of Proposed Action – The Notice provides a general description of the proposal, the agency finding on cost impacts, the public comment deadline, the agency contact persons for questions, and the address to submit written comments.

The Initial Statement of Reasons (ISOR) – The agency must provide the background and justification for its proposal in the ISOR. Other required information includes: Alternatives the agency considered; an assessment of all known cost impacts on businesses or individuals; consideration of the substitution of performance standards for prescriptive standards; and assessment of impact on small business.

The Regulation Text – The exact text of the proposed changes to the California Code of Regulations.

The Economic and Fiscal Impact Statement (STD 399 form) – Agencies are required to complete a 399 form to document cost impacts on the private sector and fiscal impacts on other government entities. This form is very important for evaluating cost impacts. Agencies are not required to place a copy on their websites, so you will likely need to contact the agency for a copy.

Reviewing the Rulemaking Documents

It is important to read the rulemaking documents to understand the proposal, and find answers to any questions you may have about the regulations.

Also consider reviewing the agency rulemaking record. State agencies are required to maintain a rulemaking record for each proposed action published in the *Register*. The record, or rulemaking file, must be available for public inspection and copying during the public comment period. The record must contain the Notice, ISOR, regulation text, and STD. 399 form. It must also contain:

- A transcript, recording or minutes of any public hearing connected with the proposal;
- Petitions, comments, and other information or data received by the agency regarding the proposal;
- All data and factual information, including studies and reports, used by the agency to develop its proposal.

Some Important Review Questions

What problem is being “solved” by each regulation (or proposed code section change)?

What is the situation in the absence of each proposed regulatory change?

Is each regulation mandated by statute, or is the agency using its designated authority to write the regulations?

What data or information was used to justify the need for each regulation?

Who does the regulation affect?

Feel free to check any agency calculations, since math or other errors could cost you money.

A key question asked by affected parties is: “What will the regulations cost?” Agencies must assess the cost impacts of their proposal on California businesses and individuals. Some of the impact requirements placed on agencies include:

- Disclosing all known cost impacts,
- Preparing an impact assessment,
- Putting the assessment results in the Notice,
- Placing supporting evidence in the ISOR,
- Assessing any impacts on housing costs, and
- Completing an Economic and Fiscal Impact Statement (STD. 399 Form).

It is important that affected and interested parties request and review all such information, since agencies may not know all the potential impacts of their proposals. Some agencies explicitly state that they welcome public comments on impact issues.

***Always keep the comment deadline
in mind -- 45 days can fly by.***

Talking to the Agency Contact Person

Questions or concerns about a proposed regulation, or agency rulemaking documents, should be discussed with the agency contact person listed in the Notice. The contact person may be able to provide information or clarification on the proposal. If the main contact person is not available, ask to speak to the back-up contact person that agencies are required to designate. If you have to leave a message, follow-up if there is no response in a few days. The comment deadline continues to approach as you wait for assistance.

It may also be useful to talk to other individuals, businesses or groups knowledgeable about, or affected by, the regulatory proposal. They may be able to provide information, or a different perspective, on the regulations.

Attending Public Workshops and Hearings

Most state agencies maintain mailing lists to announce proposed regulations and regulation-related activities, such as public hearings and workshops. Nearly every state agency has a website on the Internet, and is required to provide information on its proposed regulations there. State agency websites can be accessed through the State of California Home Page at <http://www.ca.gov>.



There is a process often used by agencies when drafting, or considering new regulations. (Regulations are considered to be a “draft” prior to their publication in the *Register*.) The agency may prepare the draft regulation and make it available to the public. The agency may also invite the public to participate in workshops or meetings to discuss its draft proposal. Such a process allows agencies to address and incorporate public input before starting the formal rulemaking process. Ask the agency to place you on their mailing list for regulatory announcements.

Be aware that public input received by an agency on their draft regulations is not entered into any rulemaking record. As a result, you must submit any written comment after the regulations are published and the 45-day public comment period begins.

When making oral comments at a hearing for proposed regulations published in the *Register*, also

submit those comments in writing. Any written comments must be responded to in the final statement of reasons. The agency is not required to respond to oral comments.

If you find that public comments made at a hearing raise a new issue concerning a proposed regulation, you may request additional time to respond to the new issue before the agency takes final action.

Preparing a Written Comment

You have a right to provide agencies with your comments and agencies are required by law to respond to written comments submitted by the public.

In general, a public comment must be considered by an agency if it is relevant to the proposed action. A comment is "irrelevant" if it is not specifically directed at the agency's proposed action, or to the procedures followed by the agency in proposing or adopting the action.

The effectiveness of a comment increases to the extent that the writer understands the statutes relating to the comment, and the documents prepared by an agency for its proposal. A comment should also address specific rulemaking requirements and provide facts or other objective information to support the comment. It is also useful to provide clear references to specific agency rulemaking documents, findings, or actions that relate to the issue being discussed.

A comment that merely questions the wisdom of a regulation is unlikely to effect any change. When the legislature gives state agencies a task, it gives them limited lawmaking power (authority to adopt regulations). The "wisdom of the agency" refers to the knowledge and experience of individuals in the agency regarding the substance of the programs and activities they oversee. Regulations proposed by an agency are presumed to incorporate the wisdom of those subject matter experts. The Government Code states that OAL, when reviewing proposed regulations for compliance with the six legal standards, "...shall ensure that it does not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations."

Identifying Possible Comment Issues

The public has broad latitude concerning the subject matter addressed in a written comment to any agency. The following material in this section discusses some possible comments based upon rulemaking requirements placed upon agencies.

Necessity. Does the record of the rulemaking proceeding demonstrate by substantial evidence the need for the regulation? Unnecessary regulations place a cost burden on the people and economy of California.

Rulemaking law occasionally uses the terms "substantial" and "significant" when describing requirements that must be met by regulatory agencies. Agencies may use these terms with or without supporting information that clarifies their meaning. The public is free to comment upon what an agency considers "substantial" or "significant," for example, when used by agencies to characterize cost impacts.

Clarity. Is the regulation written or displayed so that its meaning will be easily understood by those persons directly affected by it?

Proposed regulations that include terms that are unclear can result in unnecessary costs. Affected parties may expend time and money attempting to interpret and comply with unclear regulations. A lack of clarity can also cause an agency to inaccurately or inconsistently enforce regulations.

Cost impacts. Agencies are required to assess the potential for their regulations to cause adverse economic impacts in the state. The following are some of the specific impacts that must be assessed:

- The impact on business, with consideration of industries affected;
- The creation or elimination of jobs;
- The creation of new business, or the elimination of existing businesses;
- The expansion of existing businesses.

In addition, agencies are required to describe all cost impacts, known to the agency at the time the Notice is submitted to OAL. (These are costs that a representative private person or business would necessarily incur in reasonable compliance with the proposed action). If the public has information indicating that the agency was aware of cost impacts, but did not disclose them, it may submit a comment documenting that situation.

The ISOR must contain facts, evidence, documents, testimony, or other evidence the public relied upon to support an initial determination that the action will not have an adverse economic impact on business. The public may comment on the evidence used by the agency to support its impact findings, or on the lack of such evidence.

Business Reporting Requirements. When establishing reporting requirements on businesses, agencies must make a finding that the regulations are necessary for the health, safety, or welfare of the people of the state. The public can question this finding in its

comments, particularly if the criteria used by the agency are not clear from the rulemaking record.

Alternatives to the Regulations. In making a decision to propose a specific regulation, agencies are frequently evaluating alternatives and choosing among them. For example, agencies are required to include a description of any reasonable alternatives the agency has identified that would lessen any adverse impact on small business. Interested parties may wish to comment on the regulatory choice made by the agency.

If you believe there is an equally effective and less costly alternative, submit a comment requesting that the agency consider your alternative. If the agency is proposing regulations that mandate the use of specific technologies or equipment, the agency is required to state the reasons why the agency believes the mandate is required.

Submitting A Comment

Regardless of how your comment is sent to an agency (e-mail, facsimile, U.S. mail, or personal delivery) the written comment must be received by the comment deadline. A postmark does not suffice. In order to ensure your comment was received, you may want to call the Agency contact person and verify that the comment was received.

If your comment was not received on or before the deadline, the agency will not have to respond to your comment in the final statement of reasons (FSOR).

I Submitted a Comment. Now What?

After the close of the public comment period, the agency must summarize and respond to the comments it received. The agency may make changes to the regulatory proposal in response to comments, or on its own initiative. If the agency proposes substantial modifications that are not sufficiently related to original proposal, then a new 45-day comment period is required. If the changes are substantial, but sufficiently related to the text of the original proposal, only an additional 15-day comment period is required. Nonsubstantial modifications may be made without any additional opportunity for the public to comment.

The agency prepares the FSOR and submits the complete rulemaking record to OAL. The FSOR must include the agency's summary of and responses to all public comments. The FSOR must also contain any updates to the ISOR, and any additional information that was not presented in the ISOR. The agency posts the FSOR on its website, and also makes the FSOR available to persons who request a copy.

The agency could reject all comments received. Even if the agency does not accept your comment to

make a change to the regulations, agency staff must still explain why they disagreed with the points presented in your comments. The explanation is required to be included in the FSOR.

At any point in the process, the agency may decide to discontinue the rulemaking. If so, the agency must publish a Decision Not to Proceed in the *Register* and also post that decision on its website.



The regulatory agency has one year, from the date of publication in the *Register*, to submit the original or amended proposal and the FSOR to OAL for review and potential approval. (Although there can be a number of exceptions to the one-year limit.) OAL reviews the rulemaking file submitted by the agency for compliance with the following six legal standards:

- Necessity
- Authority
- Clarity
- Consistency
- Reference
- Nonduplication

OAL also reviews the adequacy of the agency summary of and responses to public comments. Based on the results of its review, OAL then makes a decision to approve or disapprove the regulatory proposal. If approved, the rulemaking record is closed, the proposal is filed with the Secretary of State, and the regulations become state law.

If OAL disapproves the proposal, the agency may decide not to proceed with the rulemaking. The agency may initiate a new rulemaking, as it deems appropriate.